STATE OF MICHIGAN

COURT OF APPEALS

SCOTT HASEN,

Plaintiff-Appellant,

v

CHARLES E. PERLOS,

Defendant-Appellee.

UNPUBLISHED
October 26, 2010

No. 293741
Jackson Circuit Court
LC No. 08-001187-NM

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff Scott Hasen appeals as of right the circuit court's order granting summary disposition in favor of defendant Charles E. Perlos. Because we conclude that there were no errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

In June 2006, Hasen suffered serious injuries when a motorist struck him while he was riding a motorcycle. Hasen hired Perlos to represent him for purposes of claiming insurance benefits under the no-fault act.[1] Hasen eventually received approximately $180,000 in personal protection insurance benefits from the insurer of the motor vehicle, Allstate.

At the time of the accident, Hasen had insurance coverage under a plan provided through his wife's employer, which was administered by Blue Cross Blue Shield of Texas. The couple continued paying for that insurance for two months after the accident, but then let the policy lapse. Blue Cross paid approximately $1,200 in benefits before coverage ended.

Hasen maintains that these two sources of insurance were uncoordinated and, for that reason, had he not let the Blue Cross policy lapse, he could have obtained double recovery. See *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 752; 514 NW2d 150 (1994). He further

[1] MCL 500.3101 *et seq.*

asserts that had he known he was eligible for double recovery, he would not have let it lapse, and charges Perlos with having committed legal malpractice for failing to advise him of the opportunity for double recovery.

Perlos moved for summary disposition on the ground that the Blue Cross policy provided Blue Cross with rights of subrogation and reimbursement in connection with any other source of insurance, and so Hasen would not have received double recovery in any event. Hasen retorted that Blue Cross abandoned any such rights, as evidenced by a letter stating that the case was closed.

In granting the motion, the trial court explained:

> I do note and realize we're dealing with a case within a case as well as the case. . . . Blue Cross Blue Shield has a right of reimbursement. They had a right to be subrogated, and it doesn't appear that the letter that indicates that the . . . case was closed, actually has in fact, as of this moment, resulted in that case being closed.
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> * * *
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> I have to tell you I do not believe that we can make a presumption that there will be a waiver of a right to subrogation. I just cannot reach that end that would . . . support a finding that it was the intent that there would be a right to double dip in this . . . particular matter under these particular facts as they have been presented to me. And in measuring it up against the Texas claim, you have a twelve hundred claim versus, I don't know, 165, 170 thousand dollar claim. I don't recall, but it's somewhere in there. I just find it very difficult to believe that that is what they wanted or what the expectation was.
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> And without oversimplifying it, again I doubt double recovery for the Plaintiff was an intended result. And for that reason, I do grant this motion for summary disposition . . . .

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

III. SUBROGATION

MCL 500.3105(1) states that "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor

vehicle . . . ." MCL 500.3101(2)(e) restricts the definition of "motor vehicle" to vehicles having "more than 2 wheels," and otherwise expressly excludes motorcycles. MCL 500.3114(5) provides that "[a] person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits," with subsection (5)(b) assigning the highest priority for such obligations to "[t]he insurer of the owner or registrant of the motor vehicle involved in the accident."

In this case, the Blue Cross policy, which remained in effect only briefly after Hasen's accident, and through which Blue Cross provided approximately $1,200 in benefits, included the following reimbursement and subrogation provisions:

> If you or your Dependent recover money from any person, organization, or insurer for any injury or condition for which the Plan paid benefits, you or your Dependent agree to reimburse the Plan from the recovered money for the amount of benefits paid or provided by the Plan. That means you or your Dependent will pay to the Plan the amount of money recovered by you through judgment, settlement or otherwise from the third party or their insurer, as well as from any person, organization or insurer, up to the amount of benefits paid or provided by the Plan.
>
> You or your Dependent agree to promptly furnish to the Plan all information which you have concerning your rights of recovery from any person, organization, or insurer and to fully assist and cooperate with the Plan in protecting and obtaining its reimbursement and subrogation rights. You, your Dependent or your attorney will notify the Plan before settling any claim or suit so as to enable us to enforce our rights by participating in the settlement of the claim or suit. You or your Dependent further agree not to allow the reimbursement and subrogation rights of the Plan to be limited or harmed by any acts or failure to act on your part.

The plan provided for coordination of benefits as follows:

> The availability of benefits specified in This Plan is subject to Coordination of Benefits (COB) as described below. This COB provision applies to This Plan when a Participant has health care coverage under more than one Plan.
>
> * * *
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> *Plan* does *not* include:
>
> 1. any coverage held by the Participant for hospitalization and/or medical-surgical expenses which is written as a part of or in conjunction with any automobile casualty insurance policy . . . .

These provisions indicate that the Blue Cross policy was uncoordinated, but that Blue Cross had broad rights of reimbursement and subrogation in the event that an insured had other coverage.

As noted, the trial court granted summary disposition to Perlos on the ground that Blue Cross' right of subrogation would have precluded Hasen from retaining any duplicate recovery involving Blue Cross. In order to recover under a legal malpractice theory, Hasen had to show that, but for Perlos' malpractice, he would have obtained and been able to retain the double recovery. See *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004) (listing the elements of a legal malpractice claim). In support of his claim, Hasen points to a letter from Blue Cross announcing that this case was closed, apparently thus abandoning its claims to recover any of the $1,200 it had paid. He further points to deposition testimony from an attorney specializing in the defense of claims under the no-fault act, where the expert stated, "it is rare that I've ever seen particularly a Blue Cross Blue Shield plan relying on or pushing the right of subrogation in these types of cases." The expert further opined that had Hasen been advised of his opportunity for double recovery and thus taken advantage of it, he "could have put those moneys aside in the event that [Blue Cross] chose to exercise its right of subrogation . . . ." This evidence, Hasen maintains, demonstrates a question of fact as to whether Blue Cross would have exercised its rights.

Perlos reports that the letter from Blue Cross announcing that the case was closed came in response to an assertion by Hasen's attorney that Blue Cross had no subrogation rights under Michigan law, but that Blue Cross later realized it had a right of subrogation after all and reopened the case. Perlos also provided documentation in support of that contention. After a series of letters to Allstate and Hasen's attorney asserting its rights of reimbursement and subrogation, dating from March through November of 2007, Blue Cross stated that the case was closed in a letter dated December 2007. But three months later it sent a letter to Allstate discussing a change in the lien amount. And a Blue Cross system log concerning Hasen's case indicates regular communications between Blue Cross, Allstate, and Hasen's attorney, concerning the questions of reimbursement and double dipping through April 2009.

On appeal, Hasen does not dispute the existence of Blue Cross' contractual right of reimbursement or subrogation. Nor does he question the authenticity of the documentation showing Blue Cross to have retained interest in its rights through April 2009. Instead, Hasen emphasizes Blue Cross' apparently tentative, and temporary, decision in December 2007 not to pursue the matter further. But Blue Cross subsequently reasserted its rights. This evidence can only be interpreted as indicating that Blue Cross had, and maintained, a sharp interest in exercising its rights of reimbursement or subrogation, such that had Hasen kept his insurance through Blue Cross, and received benefits from it in amounts similar to what Allstate provided, Blue Cross would have vigorously exercised its rights of subrogation or reimbursement. Further, we observe that the Blue Cross contract not only granted Blue Cross reimbursement or subrogation rights, it also imposed on Hasen a duty to disclose coverage received from other sources and to otherwise assist Blue Cross in exercising its rights. Accordingly, Hasen has not established a question of fact as to whether, had he been properly advised, he would have been able to obtain a double recovery. *Manzo*, 261 Mich App at 712.

For these reasons, the trial court correctly granted summary disposition in favor of Perlos on the ground that no failure on his part cost Hasen an opportunity to obtain double recovery for his injuries.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly